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AD

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Kluckers, Inc.

Serial No. 78322373

Justin H. Purcell of Artz & Artz, P.C. for Kluckers, Inc.

James T. Griffin, Trademark Examining Attorney, Law Office
103 (Michael Hamilton, Managing Attorney).

Before Walters, Holtzman, and Drost, Administrative
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On November 3, 2003, Kluckers, Inc. (applicant)
applied to register the mark KLUCKERS BROASTED CHICKEN
(standard character mark) on the Principal Register for
"restaurant services" in International Class 43. The
application (Serial No. 78322373) is based on an allegation
that applicant first used the mark and first used the mark
in commerce on September 1, 2003.

The examining attorney refused to register the mark
under Section 2(d) of the Trademark Act, 15 U.S.C.

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§ 1052(d), because of three registrations for the following marks:

I.
Registration No. 818,352
BROASTED CHICKEN
for "cooked poultry" in Class 29
Disclaimer: Chicken
Issued: 08 November 1966 (Renewed)

II.
Registration No. 818,763

BROASTED
Supreme

for "prepared foods - namely, cooked poultry, shrimp and fish" in Class 29
Disclaimer: Supreme
Issued: 15 November 1966 (Renewed)

III.
Reg. No. 1,848,657
BROASTER CHICKEN
for "cooked poultry" Class 29
Disclaimer: Chicken
Issued: 09 August 1994 (Renewed)

The first two registrations were issued to The Broaster Co., which is identified as an Illinois partnership. While the Office's electronic records indicate that Alco Foodservice Equipment Company is the current owner, we note that the Office's assignment records show that there were subsequent assignments. An assignment at Reel and Frame No. 0824/0367 on October 24, 1991,

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records that Alco Standard Corp.¹ assigned Registration Nos. 818,352 and 818,763 to Broaster Acquisition Corp., a Delaware corporation. Another document recorded at Reel and Frame No. 0856/0443 on April 8, 1992 and identified as a "Change of Name" indicates that Broaster Acquisition Corp. became The Broaster Company, a Delaware corporation. Similarly, the third registration, No. 1,848,657, issued to The Broaster Company, a Delaware corporation. It also contains a claim of ownership, inter alia, of the two earlier issued registrations (Nos. 818,352 and 818,763). Therefore, it appears that all three registrations are owned by the same entity, The Broaster Company, a Delaware corporation.

Applicant argues that "the term 'broasted' is merely descriptive of a method for cooking chicken." Brief at 3. Applicant argues that it "is well known in the food industry that broasting is a cooking process developed by the Broaster® Company of Beloit, Wis. in 1985. Subsequently, broasting has become an alternative to deep-frying or pan-frying." Brief at 3. Applicant also maintains that the "relation of food services to restaurants is so limited that there is virtually no overlap of purchasers and therefore no likelihood of

¹ There were several earlier assignments.

confusion. Further, food services and restaurants do not travel through the same channels of trade and distribution." Brief at 6. Applicant also points to the differences between the cited marks and its mark.

The examining attorney's position is that "applicant's restaurants serve chicken and registrant's goods include cooked poultry" and that applicant "has merely added its corporate name KLUCKERS to the registered mark [BROASTED CHICKEN]." Brief at unnumbered pages 2 and 4 (parenthetical omitted). The examining attorney also points out that a search of numerous dictionaries did not reveal any entries for the terms "broasted" or "broaster" and that applicant cannot collaterally attack the cited registrations.

After the examining attorney made the refusal final, this appeal followed.

Before we address the merits of the case, we must first address the examining attorney's objection to several references in applicant's brief. In its brief, applicant refers to information regarding common restaurant practices and several Internet websites. We agree with the examining attorney's objections. "The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not

consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed." 37 CFR § 2.142(d). Furthermore, a reference to a website does not make the information on the site of record. In re Planalytics Inc., 70 USPQ2d 1453, 1457 (TTAB 2004). Therefore, we will not consider applicant's unsupported factual assertions and new evidence in its brief.

Turning next to the issue of likelihood of confusion, we begin by noting that in these cases we consider the facts of record in view of the relevant factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000).

First, we consider the similarities and the dissimilarities of applicant's and registrant's marks. Applicant's mark is KLUCKERS BROASTED CHICKEN. The cited registrations are for the marks BROASTED CHICKEN, BROASTER CHICKEN, and BROASTER SUPREME (stylized). The BROASTED CHICKEN registration is identical to applicant's mark except for applicant's addition of its corporate name, KLUCKERS. Similarly, the BROASTER CHICKEN registration is nearly identical to the "Broasted Chicken" portion of

applicant's mark except for the hard-to-notice difference between the final letter, i.e., "Broasted" and "Broaster." The third registration contains the identical word "Broaster" with the disclaimed term "Supreme." The registered marks "Broaster Chicken" and "Broasted Chicken" are either identical or virtually identical to the "Broaster Chicken" portion of applicant's mark. Therefore, the question is whether the addition of applicant's corporate name creates a mark that is not similar to registrant's marks.

The Supreme Court has previously held that the addition of a trade name or house mark to a registered mark does not generally avoid confusion. Menendez v. Holt, 128 U.S. 514, 521 (1888):

Holt & Co., then, having acquired the exclusive right to the words "La Favorita," as applied to this particular vendible commodity, it is no answer to their action to say that there was no invasion of that right because the name of S. O. Ryder accompanied the brand upon flour sold by appellants, instead of the name of Holt & Co. That is an aggravation, and not a justification, for it is openly trading in the name of another upon the reputation acquired by the device of the true proprietor.

The CCPA has made it clear though that "there is no arbitrary rule of law that if two product marks are confusingly similar, likelihood of confusion is not removed by use of a company or housemark in association with the

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product mark. Rather, each case requires a consideration of the effect of the entire mark including any term in addition to that which closely resembles the opposing mark." New England Fish Co. v. Herwin Co., 511 F.2d 562, 184 USPQ 817, 819 (CCPA 1975). In that case, the Court held that despite the fact that both marks were used on cat food, the mark BLUE MOUNTAIN KITTY O'S (stylized) was not confusingly similar to the registered mark KITTY. In addition, when the common elements in the marks contain recognizable differences, the addition of a house mark may avoid confusion. See Rockwood Chocolate Co. v. Hoffman Candy Co., 372 F.2d 552, 152 USPQ 599 (CCPA 1967) (ROCKWOOD BAG-O-GOLD for candy not confusingly similar to CUP-O-GOLD for candy).

Recently, the board was faced with a case in which applicant was seeking to register the mark NORTON MCNAUGHTON ESSENTIALS. In that case, the application was opposed by the owner of the mark ESSENTIALS and the goods were identical in part. Knight Textile Corp. v. Jones Investment Co., 75 USPQ2d 1313 (TTAB 2005). The board found that the term "ESSENTIALS is a highly suggestive term as applied to clothing, and that applicant's addition of its house mark NORTON MCNAUGHTON renders the two marks sufficiently distinguishable." Id. at 1315.

Applicant specifically argues that the "term BROASTED and BROASTER are merely descriptive of a method for cooking chicken" and that they "immediately convey information concerning both qualities and characteristics of the product and service." Brief at 3. We begin by pointing out that in an ex parte proceeding, a cited registration is presumed to be valid and an applicant is not permitted to attack the registration. If an applicant maintains that a registration should not be a bar to its registration for reasons such as genericness or abandonment, the applicant must file a petition to cancel the registration to present these arguments. In re Dixie Restaurants, 105 F.3d 1405, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997):

Dixie's argument that DELTA is not actually used in connection with restaurant services amounts to a thinly-veiled collateral attack on the validity of the registration. It is true that a prima facie presumption of validity may be rebutted. See Dan Robbins & Assocs., Inc. v. Questor Corp., 599 F.2d 1009, 1014, 202 USPQ 100, 105 (CCPA 1979). However, the present ex parte proceeding is not the proper forum for such a challenge. Id. ("One seeking cancellation must rebut [the prima facie] presumption by a preponderance of the evidence."); Cosmetically Yours, Inc. v. Clairol Inc., 424 F.2d 1385, 1387, 165 USPQ 515, 517 (CCPA 1970); TMEP Section 1207.01(c)(v) (1993); 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* Section 23.24[1][c] (3d ed. 1996). In fact, Cosmetically Yours held that "it is not open to an applicant to prove abandonment of [a] registered mark" in an ex parte registration proceeding; thus, the "appellant's argument ... that [a registrant] no longer uses the registered mark ... must be disregarded." 424 F.2d at 1387, 165 USPQ at 517;

cf. In re Calgon Corp., 435 F.2d 596, 598, 168 USPQ 278, 280 (CCPA 1971) (applicant's argument that its use antedated a registered mark was effectively an improper collateral attack on the validity of the registration, which should have been made in formal cancellation proceedings).

Therefore, we cannot entertain applicant's argument that the cited marks are merely descriptive.² However, we will consider applicant's argument to the extent that we assume that applicant is arguing as in the Knight Textile case that its mark should be registered because the overlapping portion of applicant's and registrant's mark is highly suggestive. Nevertheless, even considered in this manner, applicant's argument must fail primarily because the record does not support applicant's position. The examining attorney submitted evidence of a lack of entries for the terms "broaster" or "broasted" in dictionaries. While applicant asserts that "it has become common for restaurants to purchase broasters and offer broasted chicken on their menus," (Brief at 4), there is simply no evidence to support this point. Furthermore, even if there was evidence of the type that applicant alleges, it is not clear whether these uses would simply be licensees of registrant's BROASTER CHICKEN and BROASTER CHICKEN marks.

² We add that the three cited registrations have been on the Principal Register for more than 5 years and they would not be subject to attack on the basis of mere descriptiveness. 15 U.S.C. § 1064.

When we consider the marks as a whole, we hold that the similarities of the marks outweigh their differences. Applicant's mark KLUCKERS BROASTED CHICKEN is similar to registrant's marks, particularly the BROASTED CHICKEN and BROASTER CHICKEN marks.³ The common portions of the marks are either identical or virtually identical in sound, appearance, meaning, and commercial impression. The addition of applicant's corporate name under the facts of this case does not create a dissimilar mark. See In re C.F. Hathaway Co., 190 USPQ 343, 345 (TTAB 1976) ("[W]e are firmly of the opinion that purchasers confronted by 'GOLF CLASSIC' men's hats and 'HATHAWAY GOLF CLASSIC' for men's knitted sport shirts are likely to assume that both products emanate from or are in some way associated with applicant, i.e., that this is one of those cases where the addition of the house mark is an 'aggravation rather than a justification'). See also In re Apparel Ventures, Inc., 229 USPQ 225, 226 (TTAB 1986):

Those already familiar with registrant's use of its mark [SPARKS] in connection with its goods, upon encountering applicant's mark [SPARKS BY SASSAFRAS] on applicant's goods, could easily assume that "sassafras" is some sort of house mark that may be used with only some of the "SPARKS" goods.

³ While applicant in its brief (p. 4) refers to "the particular font used" with registrant's mark, Registration Nos. 818,352 and 1,848,657 are identified as "typed drawings" and, therefore, the registrations are not limited to any particular font or style.

Conversely, those familiar with only applicant's mark would, upon encountering the registered mark on related goods, assume that all "SPARKS" products come from a single source, and that that source was in some instances further identified with the words "by sassafras."

We also note that in a somewhat similar case the U.S. District Court for the Eastern District of Michigan held that the marks "'Al's Kentucky Fried Chicken' and 'Al's Kentucky Style Fried Chicken' are confusingly similar to plaintiff's name and mark KENTUCKY FRIED CHICKEN."

Kentucky Fried Chicken Corp. v. Smith, 351 F.2d 1311, 175 USPQ 154, 155 (E.D. Mich. 1972). Therefore, we conclude that applicant's and registrant's marks are similar.

Next, we consider the goods and services of applicant and registrant. Applicant seeks registration for its mark used in association with restaurant services. The cited registrations' goods all include "cooked poultry." Applicant refers to registrant's goods as "cooked poultry food service" and maintains that customers of food services "are typically purchasing food in large quantities and for special events and are therefore likely to ensure they are acquiring a desired and specific product." Brief at 6. We cannot read the goods as being so limited. Paula Payne Products v. Johnson Publishing Co., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of

likelihood of confusion must be decided on the basis of the respective descriptions of goods"). "Cooked poultry" can include cooked chicken that is available for carry out at restaurants, grocery stores, and similar establishments.

"In order to find that there is a likelihood of confusion, it is not necessary that the goods or services on or in connection with which the marks are used be identical or even competitive. It is enough if there is a relationship between them such that persons encountering them under their respective marks are likely to assume that they originate at the same source or that there is some association between their sources." McDonald's Corp. v. McKinley, 13 USPQ2d 1895, 1898 (TTAB 1989). See also In re Opus One Inc., 60 USPQ2d 1812, 1814-15 (TTAB 2001).

Because the services here involve restaurant services and the cited registrations involve food items, we must also consider that there is no per se rule that confusion is likely simply because "similar or even identical marks are used for food products and for restaurant services." Jacobs v. International Multifoods Corporation, 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982). See also In re Coors Brewing Co., 343 F.3d 1340, 68 USPQ2d 1059, 1064 (Fed. Cir. 2003) ("But the registered mark in this case is simply for restaurant services in general, and the Board's conclusion

that restaurant services and beer are related is based on the fact that a tiny percentage of all restaurants also serve as a source of beer, which is a very weak evidentiary basis for a finding of relatedness").

However, the Coors Brewing court explained that the case would have been different "if the registrant's mark had been for a brewpub or for restaurant services and beer. In that case, the goods and services associated with the two marks would clearly be related." Id. In this case, applicant's mark is for KLUCKERS BROASTED CHICKEN and applicant has disclaimed the word "Chicken." The menu from applicant's restaurants includes the following items (prices omitted):

BROASTED CHICKEN...

- 2 pc Chicken Snack
- 4 pc Chicken Dinner
- 3 pc Wing Snack
- 5 pc Wing Dinner
- 3 pc Chicken Tenders
- 5 pc Chicken Tenders

Chicken Only Buckets Ala Carte...

Individual Pieces

- Breast white meat
- Wing white meat
- Thigh dark meat
- Leg dark meat

Family Bucket Meals

- Small Bucket
- 8 pieces of Broasted Chicken
- Choice of Potatoes
- 1 pint of Cole Slaw

3 Biscuits

The menu also contains a section for "Kluckers Party Orders" that list prices for orders of between 30 to 200 pieces of chicken and indicates that applicant's services include: "Carry out and catering for all occasions." Clearly, this evidence shows that applicant's restaurants are selling "cooked poultry," i.e., cooked chicken, and that there is a relationship between applicant's restaurants selling cooked chicken for carry out and catering and registrant's cooked poultry. See In re Azteca Restaurant Enterprises Inc., 50 USPQ2d 1209, 1211 (TTAB 1999) ("The average consumer, therefore, would be likely to view Mexican food items and Mexican restaurants services as emanating from or sponsored by the same source if such goods and services are sold under the same or substantially similar marks"). See also Opus One, 60 USPQ2d at 1815 ("The fact that applicant's restaurant serves the type of goods (indeed the actual goods) identified in the cited registration is certainly probative evidence which supports a finding under the second *du Pont* factor that applicant's services and opposer's goods are related"). Therefore, we find that applicant's services and registrant's goods are related. Furthermore, the prospective purchasers of restaurant services and cooked poultry would at least in

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part overlap inasmuch as the same purchasers are likely to patronize restaurants selling chicken and purchase cooked poultry.

Because we have found the marks are similar and that consumers are likely to believe that there is an association between restaurant services and cooked poultry, we conclude that there is a likelihood of confusion.

Decision: The refusal to register applicant's mark under Section 2(d) is affirmed.